SUPREME COURT, U. S.

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In The Supreme Court of the United States

October Term, 1974

No. 74-570

HERBERT H. DEAN,

Petitioner

vs.

FORD MOTOR COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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JURISDICTION

On August 13, 1974 the United States Court of Appeals for the Ninth Circuit made and entered its order affirming the judgment of the United States District Court for the Northern District of California, made in open court on September 25, 1973, against petitioner and for defendant Ford Motor Company. The opinion of the United States District Court, as excerpted from the Reporter's Transcript of September 25, 1973, and the opinion of the United States Court of Appeals for the Ninth Circuit are set out in the appendix affixed hereto.

The judgment of the United States Court of Appeals for the Ninth Circuit is now final for all purposes, no petition for rehearing having been filed. The statutory provisions conferring jurisdiction upon this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit are as follows: 28 U.S.C. Section 1254; 28 U.S.C. Rule 19.

REASONS FOR ALLOWANCE OF THE WRIT

In *Monroe* v. *Pape* (1961) 365 U.S. 167, this Court granted a Writ of Certiorari in an action for violation of the federal Civil Rights Act, Section 1983 of Title 42, because of a seeming conflict in the Court of Appeals ruling affirming dismissal of the Complaint with the Supreme Court's prior cases (28 U.S.C. Rule 19). Petitioner herein alleges the same grounds for allowance of the Writ in his petition, in that the Court of Appeals' ruling affirming the District Courts' judgment for respondent herein, dismissing petitioner's complaint against respondent for violation of Title VII of the

1964 Civil Rights Act (42 U.S.C. 2000-e through 2000-e-17), is in seeming conflict with this Court's ruling and opinion in *McDonnell Douglas Corporation* v. *Green*, (1973) 93 Sup. Ct. 1817.

QUESTION PRESENTED FOR REVIEW

The question presented here for review is:

In deciding whether or not a plaintiff has presented a prima facie case under the procedure enunciated in *McDonnell Douglas* for the order and allocation of proof in a private, single-plaintiff action challenging employment discrimination, may the Court consider the evidence presented by defendant after the completion of plaintiff's case in chief?

FACTS OF THE CASE

The essential facts of the case and grounds for federal jurisdiction are set out in the complaint affixed hereto as an appendix. Petitioner is a Negro and was employed at its San Jose Plant from July 25, 1966 to January 11, 1972. Petitioner alleged that, during said period of time, he made application for promotion to foreman and that he, and others he sought to represent, were denied promotion by respondent because of racial discrimination. Respondent denied that petitioner made application for promotion and denied that promotion was denied because of racial discrimination.

The District Court and the Court of Appeals both agreed with petitioner that the case should be governed by the rule of *McDonnell Douglas, supra.*

The evidence presented by the petitioner during his case in chief at trial was not contradicted during cross-

examination, redirect or re-cross-examination. The testimony was that: 1) Petitioner belongs to a racial minority; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that despite his qualifications he was rejected; and 4) after his rejection the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. (See *McDonnell Douglas, supra,* page 1824). Petitioner also presented during his case in chief and on rebuttal statistics and other evidence tending to show discriminatory employment practices on the part of respondent regarding Negroes.

Respondent, during the presentation of its case, presented evidence tending to refute petitioner's evidence that he applied for and was qualified for promotion to foreman.

The District Court in its opinion concluding that petitioner had not made a prima facie showing that he had applied and was qualified for the job of foreman, admitted that it had relied on rebuttal evidence presented *by respondent after petitioner had concluded his case in chief.*

The Court of Appeals stated in its opinion affirming the District Court's ruling: " . . . the district court properly considered the evidence of both parties in determing whether plaintiff had sustained his initial burden of proving a prima facie case of racial discrimination in employment." (See Appendix B.)

ARGUMENT

A. UNDER THE PROCEDURE FOR TRIAL LAID OUT IN *McDONNELL DOUGLAS* CONCERNING THE ORDER AND ALLOCATION OF PROOF IN A PRIVATE, SINGLE-PLAINTIFF ACTION CHALLENGING EMPLOYMENT DISCRIMINATION, IF A PLAINTIFF PROVIDES THE COURT WITH COMPETENT EVIDENCE SUFFICIENT TO ESTABLISH THE FOUR CRITERIA OF *McDONNELL DOUGLAS* IN HIS CASE IN CHIEF, HE HAS ESTABLISHED A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION.

By the direct testimony of plaintiff and other witnesses, plaintiff provided the Court in his case in chief with competent evidence that he had applied and was qualified for the job of foreman. In California, except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact (California Evidence Code Section 411. Also, in California, generally the uncontradicted testimony of a witness to a particular fact may not be disregarded but should be accepted as proof of the fact (*Joseph* v. *Drew*, 1951, 36 Cal. 2d 575).

With such evidence as plaintiff presented in his case in chief, the District Court should have found that plaintiff had made a prima facie showing that he had applied and was qualified for promotion to foreman. Black's Law Dictionary, Revised (Fourth Edition, West's Publishing Company), defines a prima facie case as "such as will suffice until contradicted and overcome by other evidence." A statement of the law regarding a prima facie case may be found in *Frank Meline Company* v. *Kleinberger*, 108 C.A. 60, wherein the Court stated that "a prima facie case is one which is

established by evidence and can be overthrown only by rebutting evidence adduced on the other side" (*supra*, at p. 63).

A finding that plaintiff had established a prima facie case at the end of his case in chief would have shifted the burden of p. of to respondent to "articulate some legitimate, non-discriminatory reason for plaintiff's rejection" (*McDonnell Douglas*, *supra*, at 1824) such as that plaintiff had *not* applied or was *not* qualified for promotion to foreman.

If respondent successfully rebuts plaintiff's prima facie case, under the *McDonnell Douglas* (*supra*, at 1825) "the inquiry must not end there." Rather, the plaintiff must then be allowed to present evidence that the rebuttal of the defendant was pretextual," that is, just a cover-up for racially discriminatory employment practices. The plaintiff may do this by 1) a showing of statistics, 2) a general showing of a pattern of discrimination and, 3) showing that the defendant treated whites differently from minorities in their promotional employment practices (*McDonnell Douglas*, *supra*, at 1825).

In the present case, petitioner made a showing of statistics, a general showing of a pattern of discrimination *and* a showing that the respondent treated whites differently from minorities in their promotional practices both in his case in chief and in rebuttal to respondent's case. However, the trial court refused to consider such evidence and specifically stated that it did not feel it needed to consider statistics nor the other evidence presented when it found the second element of plaintiff's prima facie case to be rebutted. (See Appendix A.) The Court of Appeals agreed. Such a hold-

ing and reasoning are clearly in conflict with this Court's ruling in *McDonnell Douglas* if the plain words of that case are to have the clear meaning ordinarily given to them.

CONCLUSION

In this time of celebration of the Bicentennial of the birth of our nation we are still trying to achieve the great hopes our Constitution holds out for all the world, one of which is equality of opportunity for all. The gains in the direction of equal opportunity for all have been slowly and often painfully achieved in the face of strong and continued opposition. The decision in *Brown* v. *Board of Education*, 347 U.S. 483 did not come quickly or easily to our land. It took Congress 100 years after the end of the Civil War to pass the Civil Rights Act of 1964 prohibiting racial discrimination in employment practces. Yet equal employment opportunity is still only a hope or a goal in many sectors of our economy.

This Supreme Court correctly realized in *McDonnell Douglas* that racial discrimination, though it exists, is often difficult to prove: employers usually have greater resources at their disposal to rebut accusations of racial discrimination than does the individual plaintiff to prove racial discrimination. Accordingly, not only this Court but other federal courts as well, have given great leeway to the Title VII plaintiff in allowing him to employ statistics and give other indirect evidence of discrimination in order to prove he, individually, was unlawfully discriminated against.

The often cited aphorism (*U.S.* v. *Ironworkers Local No. 6*, 443 F2d 544), "statistics often tell much and the

courts listen," is a firmly entrenched judicial maxim regarding Title VII cases that should not be ignored. A prima facie case of discrimination may even be established on the basis of statistics alone. (*Stamps* v. *Detroit Edison Company*, (1973) 365 F. Supp. 87; *James* v. *Leeway Motor Freight, Inc.*, 431 F 2d 245, *U.S.* v. *Sheet Metal Workers, International Local Union 36*, 416 F 2d 123.)

Yet the District Court and the Court of Appeals in the present case found statistics and other evidence of discrimination irrelevant to the presentation of petitioner's case. The gains toward equal employment opportunity that have been achieved in our country at so great cost and effort should not now be allowed to be thrown aside, disregarded and ignored by any federal Court.

The opinions of the lower courts in this case not only conflict with the clear words of *McDonnell-Douglas*, but also with the spirit and policy behind that case, as well as with the intent of Congress in enacting the 1964 Civil Rights Act.

The judgment below should be reversed.

Respectfully submitted,

Dated, Sacramento, California,
October 29, 1974.

/s/ NATHANIEL S. COLLEY
Attorney for Petitioner

NANCY B. REARDAN
Of Counsel

DECISION OF DISTRICT COURT TAKEN FROM REPORTER'S TRANSCRIPT, SEPT. 25, 1973

. . . . I have read your pretrial briefs and done some research on my own. I don't think any lengthy argument would be of assistance to the Court. I am ready to give my decision right now.

So the following remarks shall consist of the opinion and decision of the Court, including the findings of fact and conclusions of law.

This case came on for trial on September 24 and September 25, 1973, in this department. The plaintiff, Herbert H. Dean, appeared in person and through his attorney, Nancy Reardan, Esquire, and the defendant, Ford Motor Company, appeared through its attorneys, Charles Prael and Huali Mullins.

This is a Civil Rights action brought under Title 7, Section 706(f) of the Federal Civil Rights Act of 1964. The defendant is a corporation. It assembles automobiles at its plant at San Jose for sale and distribution in interstate commerce. It employs in excess of 3,500 employees in said plant.

The plaintiff is a Negro and was employed as an hourly employee by the defendant at its San Jose plant from July 25, 1966, to January 11, 1972. During said period of time, the plaintiff alleges that he made application for promotion to foreman, and also that he had made application for transfer to the Cushion Department of said plant; and further alleges that the plaintiff was denied promotion or transfer by the defendant because of his race or color.

There has been some evidence in the case with reference to statistics showing a comparativly few number

of racial minorities being hired or promoted during the relevant years, and, of course, it is well known that the courts have held statistics showing a comparatively small number of racial minorities hired or promoted is sufficient to establish a violation of Title 7 of the 1963 Civil Rights Act (*Parham* v. *Southwestern Bell Telephone Co.*, 433 CAR, 1970); also, that the 1964 Civil Rights Act encompasses present and continuing effects of past discrimination, and relief may be granted to remedy such discrimination (*Griggs* v. *Duke Power Co.*, 420 F. 2d 1225) and *U.S.* v. *Brotherhood of Carpenters and Joiners of America, Local 169*, CA Illinois 1972), and also, whether there has been discrimination in the past, those employees who have been discriminated against have the right to have their expectations raised even if the expectations of others must be lowered in order to achieve statutory mandated equality (*Robinson* v. *Lorillard Corporation*, 404 U.S. 1006).

However, this Court is of the opinion that the case involving Dean versus Ford Motor Company is not to be governed—to be decided with reference to the criteria and statistics and proposition heretofore enunciated. However, it should be governed by the decision of McDonnel Corporation – *McDonnell Douglas Corporation* v. *Green*, 36 Lawyers Edition 2d. 668, decided May 14, 1973, wherein the Court held – the United States Supreme Court held that in a trial under Title 7 of the Civil Rights Act of 1964, which requires equal employment opportunities, the complainant must carry the initial burden of establishing a prima facie case of racial discrimination. This may be done by showing, one, that he belong to a racial minority; two, that he applied and

was qualified for a job for which the employer was seeking applicants; and, three, that despite his qualifications he was rejected; and four, that after his rejection the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

So initially it is incumbent upon a plaintiff in an action under this section to satisfy each of the four requirements, and the crucial requirements to be satisfied in this instant case are the requirements set forth by the Court in Number Two, which is that the plaintiff must prove a prima facie case that he has applied and was qualified for a job for which he was employed and was seeking – and was qualified for the job for which the employer was seeking applicants.

So we have two issues: One, did he apply; and, two, was he qualified for the job. This is the burden that the plaintiff must first carry and this is the burden to be proved in order to establish his prima facie case. So the issues boil down to, in this particular case, did the plaintiff file an application, and, two, has the plaintiff established that he is qualified for the job. Therefore, the basic issue is when did the unlawful, if such is the case—when did the unlawful employment practice occur.

Now with reference to "Did the plaintiff file an application," the testimony, as the Court finds, is that the plaintiff filed his first application on November the 12th, 1967. [Now the plaintiff has stated this on direct—on the cross-examination, setting forth the date to be November 12, 1967. On *rebuttal* he has contended that it was not on that particular date but on another date.

However, the issue then comes to a question of credibility of the witness, and the Court finds that the date which he did state, November 12, 1967, even though this date is not a crucial date with reference to the Act here, because of Section 706(d) – might not very well apply to the November, 1967 contention. But assuming that it did apply to the November, 1967 contention, the plaintiff has stated that he handed his application to Mr. Rossi. However, *Defendant's B in evidence* shows that Mr. Rossi was not the plaintiff's foreman and, therefore, under the procedures, any handing to Mr. Rossi would have been to no avail because Mr. Rossi – the last date Mr. Rossi was a foreman was on January 31, 1967.] (Emphasis added.)

Also, there has been no evidence whatsoever to substantiate a request for a transfer to the Cushion Department in February of 1966.

Now with reference to the application of June 10, 1968, the plaintiff, on cross-examination, indicated that that was the date that he submitted his application to Mr. O'Brien. However, on rebuttal, having been confronted with this date, it states that it was in the midsummer. However, in raising the fact that it was handed to O'Brien on June 10, 1968, which was his testimony on direct and also his testimony at the deposition, Defendant's D, E, F and G in evidence show that Dean was not working that day as the plant was shut down, and also that Green – a Mr. Green was his foreman and not Mr. O'Brien.

Mr. O'Brien, having taken the stand, states that Mr. Dean, "Never gave me a filled-out form for any promo-

tion," and he identified the plaintiff and stated that at no time did he ever hand him an application.

Also, the only evidentiary matter we have of a request by the plaintiff of wanting a promotion was in the form of the complaint that was subsequently filed with the Equal Employment Opportunity Commission on October 8, 1968, and the Court takes great cognizance of the fact and places great importance on the fact that during the interim from November – or during any period if you assume what the plaintiff says is correct– of any period during 1967, or June or the mid-year, 1968, where he states he made application for promotion, in the letters that he wrote on behalf of the Committee for Equality and Opportunity – the letter of September 5th, 1968, and the subsequent letters – at no time therein does he mention the fact that he, himself, has been a victim of discrimination because of his application having been turned down or not being acted upon, and the Court places a great deal of emphasis upon the letter that was written by Mr. Riddle who was the Plant Manager, which came into evidence as Plaintiff's Exhibit No. 2 and is dated September 19, 1968, which letter is directed to Mr. Dean, the plaintiff herein, in which it states: "We are pleased to include in our response the request that you or any other employee refer any individual applications to us on behalf of yourself or acquaintances whom you believe qualified for employment, either salaried or hourly. Such applications will receive sincere consideration for any openings that arise."

Now in response to that, the plaintiff filed no application, filed no request for – or filed a contention that

he had filed an application which was not acted upon, but remained silent until he filed his complaint on October 8, 1968, and the Court is of the opinion that the plaintiff should have acted, if his contentions were correct – he should have acted in response in some manner to the September 19, 1968 letter rather than to remain silent. This would go to bear upon the weight to be given the testimony that is counter to the testimony that he file applications on the two dates that he suggests.

Therefore, the Court feels that the plaintiff has not made a prima facie showing and is of the opinion and finding that the plaintiff has not made a prima facie showing that he had, in fact, made an application for the position of foreman.

The second part of number two, as set forth by the Supreme Court, states that he must make a showing he was qualified for a job for which the employer was seeking applicants.

Now the only evidence that we have that he was qualified is evidence that he was working as an assemblyman and also the fact that he held three degrees, a Bachelor of Science degree from Arizona State, a Master's degree in Sociology from the University of California and an LLB from Lincoln School of Law in the Bay Area.

Now other than these two items, there is no other evidence in the case that would establish the fact that this plaintiff was qualified to hold the job.

Now granted at first blush we would say: Well, any individual who holds a Bachelor's degree and a Master's degree and an LLB should, ipso facto, be qualified to

hold a foreman's job. That may or may not be true. Just because I hold an LLB and a J.D. degree doesn't necessarily mean I am qualified to hold a foreman's job because of the criteria that has been established for those positions as set forth by Mr. Kelly who is the Industrial Relations supervisor. He was supervisor of Salaried Personnel and Training at the plant and states that a person can be an excellent assemblyman yet not make a good foreman. Also, he set forth the duties and criteria to be established in order to make – to perform the duties of a foreman, and they are, among other things, to maintain production, responsibility for stock, parts, for the direct labor standards, for quality of the car, to maintain costs – keep costs down – maintain time sheets and a process book, and the first stage of any grievance that the employees may have, and also that he himself, should have a good attendance record. So there are certain quailties that are inherent in this position that are superior to those qualities that are necessarily included in those of any assemblyman. So there should be some evidence to show this plaintiff does have those qualities.

Also, Mr. O'Brien set forth this morning some of the qualities that should be had with reference to being a foreman in the nature of the responsibilities and, in fact, they are higher than the fact that you have to be able to handle people. Each one is handled differently. In fact, he said you have to be part mother, father and babysitter. In other words, you have to be a person that is going to be able to handle 15 to 25 people under your command.

Now it may be inferentially an individual holding a degree in Sociology and an LLB might be able to fill these criteria, and certainly, having witnessed Mr. Dean on the stand, he is certainly an intelligent, articulate, personable individual. But that, standing alone, is not sufficient to fill the criteria for this particular job of foreman.

Mr. O'Brien who testified this morning, even through at his young age he was able to acquire the position of foreman, he was a journeyman mechanic prior to that time. So degrees in college don't necessarily mean qualification of an individual for a particular position, and especially when the burden is upon the plaintiff in this position to establish his qualifications.

The evidence that the plaintiff has presented forward is the evidence of Mr. Lusk who states that the plaintiff was a good technical worker and he was a conscientious employee. Mr. Kennedy states he was a conscientious employee and did his work well. However, both of these people that made these statements are not formen. Being a concientious employee and doing your work well as an assemblyman doesn't necessarily conclude that one would do the work well as a foreman in this particular position.

Now when Mr. O'Brien, who had been Mr. Dean's foreman at one time, was asked the question, "Was Mr. Dean a good worker," he retorted with the answer that he was a fair worker and also, as I stated before, stated that he had not received any application from Mr. Dean.

Therefore, there is no evidence here that would establish the criteria sufficient to satisfy Point Two of the Supreme Court's ruling with reference to the unlawful practices and being able to sustain a prima facie case.

Now the crucial question in this case, as I said before, is whether or not there was an unlawful employment practice which occurred, and the Court finds that there was no evidence that an application for foreman was filed, nor that there is evidence – prima facie evidence – to sustain the fact that the plaintiff was qualified for the position, given the fact and understanding that the Court has knowledge of the plaintiff's educational level. And I merely point this out because of the fact that the evidence must show that he does come within the qualities necessarily incumbent upon an individual to be a foreman, and I don't want to take away from the fact that this gentleman is highly educated. But that doesn't necessarily mean just because you are highly educated and you have expertise in certain fields that you then become expert in all fields, and especially those of us who have LLB degrees. Sometimes we begin to think we are expert in all fields. Unfortunately we are not expert in all fields.

So the Court's finding is that the plaintiff has not sustained his burden of proof, and the conclusion of law that the defendant has engaged in no unlawful employment practice against the plaintiff under Title 7 of the Civil Rights Act of 1964; and that this Court has jurisdiction of this action by virtue of Section 706(f) of the Civil Rights Act of 1964. Further, that the plaintiff is not entitled to back wages, injunction or costs or any other relief against the defendant and the defendant is entitled to its costs.

That is the judgment of the Court, gentlemen and ladies. Thank you.

(Whereupon the proceedings were adjourned.)

UNPUBLISHED OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT H. DEAN,
Plaintiff-Appellant,
vs.
FORD MOTOR COMPANY,
Defendant-Appellee.

NO. 73-3574

MEMORANDUM

[August 13, 1974]

Appeal from the United States District Court for the Northern District of California

Before: KOELSCH and KILKENNY, Circuit Judges, and CRARY,* District Judge.

Herbert H. Dean brought this action pursuant to Title VII of the Civil Rights Act of 1964 (78 Stat. 253), claiming that he was denied a promotion by defendant because of his race. Dean also sought to have the action maintained as a class action. After a hearing, the district court denied certification for the action to proceed as a class action. The cause was then tried as a single plain-

*The Honorable E. Avery Crary, United States District Judge for the Central District of California, sitting by designation.

tiff action. The district court, finding that Dean had not proven that he had in fact made an application for promotion to foreman, entered judgment against Dean and for defendant Ford Motor Company. This appeal followed.

The Supreme Court in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), held that in a private, single-plaintiff employment discrimination case,

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that *he applied* and was qualified *for a job for which the employer was seeking applicants*; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . ." *Id* at 802 *(emphasis added)*.
>
> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the *employee's rejection*." *Id. (emphasis added)*.

The record in this case manifests that the district court correctly applied the rule of *McDonnell-Douglas*. Contrary to the assertion of appellant, the district court properly considered the evidence of both parties in determining whether plaintiff had sustained his initial burden of proving a prima facie case of racial discrimination in employment. The record further shows that the district court did not err in finding that plaintiff had failed to sustain his initial burden of proving that he had in fact made application for promotion to the

position of foreman. Absent such proof, the burden never shifted to the defendant to defend its action by showing some legitimate reason for rejection. Accordingly, the district court was not required to consider the racial employment statistics presented by plaintiff in surrebuttal.

We likewise conclude that the district court was justified on the basis of the record before it, in finding that the requisites for a class action were lacking.

The judgment of the district court is affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HERBERT H. DEAN,
Plaintiff,

vs.

FORD MOTOR COMPANY, a Corporation,
Defendant.

COMPLAINT FOR INJUNCTION AND APPROPRIATE AFFIRMATIVE RELIEF

Plaintiff alleges:

I

This action is brought under the provisions of Title VII, Section 706(f) of the Federal Civil Rights Act of 1964.

II

That defendant is a corporation, and it manufactures automobiles at San Jose, California, for sale and distribution in interstate commerce; that it employs approximately 4,000 persons in its San Jose facility.

III

That plaintiff is now and at all times mentioned herein has been an employee of defendant at its San Jose facility; that plaintiff is a citizen of the United States and resides within this Judicial District; that plaintiff belongs to an ethnic group of citizens called Negroes.

IV

That heretofore, during the month of June, 1968, plaintiff applied for a promotion in his employment by defendant to the rank of foreman, but because of his race or color, defendant failed and refused to promote him, and has at all times denied him promotional opportunities because of his race or color, all in violation of Title VII, Federal Civil Rights Act of 1964.

V

That on or about October 8, 1968, plaintiff delivered a complaint with the Equal Employment Opportunity Commission, San Francisco, California charging such discrimination by defendant against him; that said complaint was duly served upon defendant on or about October 23, 1968, and is Equal Employment Opportunity case No. YSF9-078.

VI

That said Equal Employment Opportunity Commission deferred said complaint to the appropriate State Agency on October 15, 1968; that notice of termination of the State Agency's proceedings was received on October 21, 1968, on which date said Equal Employment Opportunity Commission accepted said complaint for filing; that the same was filed within the time allowed by law.

VII

That the Equal Employment Opportunity Commission made a full and complete investigation of said complaint, and on or about November 19, 1970, in case

No. YSF9-078, Decision No. 71 505, held that there is reasonable cause to believe that defendant has engaged in unlawful employment practices in violation of Title VII, Federal Civil Rights Act of 1964, by denying plaintiff and other Negro employees equal opportunity for promotion to the rank of foreman.

VIII

That plaintiff brings this action pursuant to Rule 23, Federal Rules of Civil Procedure, on behalf of himself and all other Negro employees of defendant at its San Jose, California facility who have been likewise unlawfully discriminated against with respect to opportunities for promotion by defendant, in violation of Title VII; that the class so represented is definite and easily ascertainable from the personnel and other records of defendant; that the questions of law and fact are common in the claim of plaintiff and the class, in that each charges discrimination in violation of Title VII; that plaintiff is willing and able to adequately represent the entire class.

IX

That the relief sought by plaintiff and members of the class is the same.

X

That the Equal Employment Opportunity Commission attempted in good faith to obtain voluntary compliance with Title VII by defendant with respect to plaintiff and the class he represents, but defendant refused to comply.

XI

That on or about January 3, 1972, said commission advised plaintiff in writing of such non-compliance, and advised plaintiff that he was authorized to institute this action.

XII

That the facts upon which this action is taken is stated in the Summary of Investigation contained in the Equal Employment Opportunity Commission Decision No. 71 505, dated November 19, 1970, and is set out below:

SUMMARY OF INVESTIGATION

Charging Party was hired by Respondent as an Assembler in July, 1966. He alleges that he applied for and was denied promotion to foreman in November, 1967, and again in June, 1968. He further alleges that he applied for and was denied a transfer to the Cushion Department in February, 1968. Charging Party alleges that he was denied these promotions and transfer because of his race. Several other Negro employees, all of whom had lengthy experience with Respondent, allege that they were also denied promotions to foreman because of their race.

Respondent denies the charge. The evidence indicates that as of 1965 there was only one Negro foreman in the plant. Twelve Negroes have been advanced to foreman positions since 1965. The record shows that the successful Negro applicants had considerably longer service with Respondent than successful Caucasian applicants. The 13 Negroes counted among 350 officials

and managers are all first-line foremen, and there are no Negroes in the upper levels of administration.

The evidence reveals that Respondent's selection system for foreman is based largely upon the recommendations of incumbent foremen. Applicants are neither advised that applications have been received, nor told if they are under consideration for promotion. Moreover, promotion applications are often lost, as were Charging Party's and other Negroes' applications.

This Commission has held that where the proportion of Negro foremen to all foremen is substantially less than the proportion of Negroes to the total plant employment and incumbent foremen's recommendations are required for promotion to that position, the system constitutes an unlawful employment practice where it is used as a strategem for denying promotional opportunities to Negroes or has that effect. (Commission Decision No. 70-94, August 19, 1969.)

In the instant case the number of Negro foremen as well as the application procedures make it reasonable to infer that Respondent's policy has resulted in discrimination against Negro employees. Although several Negroes have been promoted to foremen positions since 1965, the recommendation policy tends to perpetuate the effect of past discrimination and is unlawful unless it serves an overriding legitimate business purpose. Cf., *Local 189, United Papermakers and Paperworkers* v. *United States* 416 F. 2d 980 (5th Cir. 1969).

Charging Party's allegation that Respondent discriminates against Negroes generally, is not supported by the evidence of record. There is no evidence of discrim-

ination with respect to initial hiring, job assignments or termination procedures.

WHEREFORE, plaintiff prays judgment as follows:

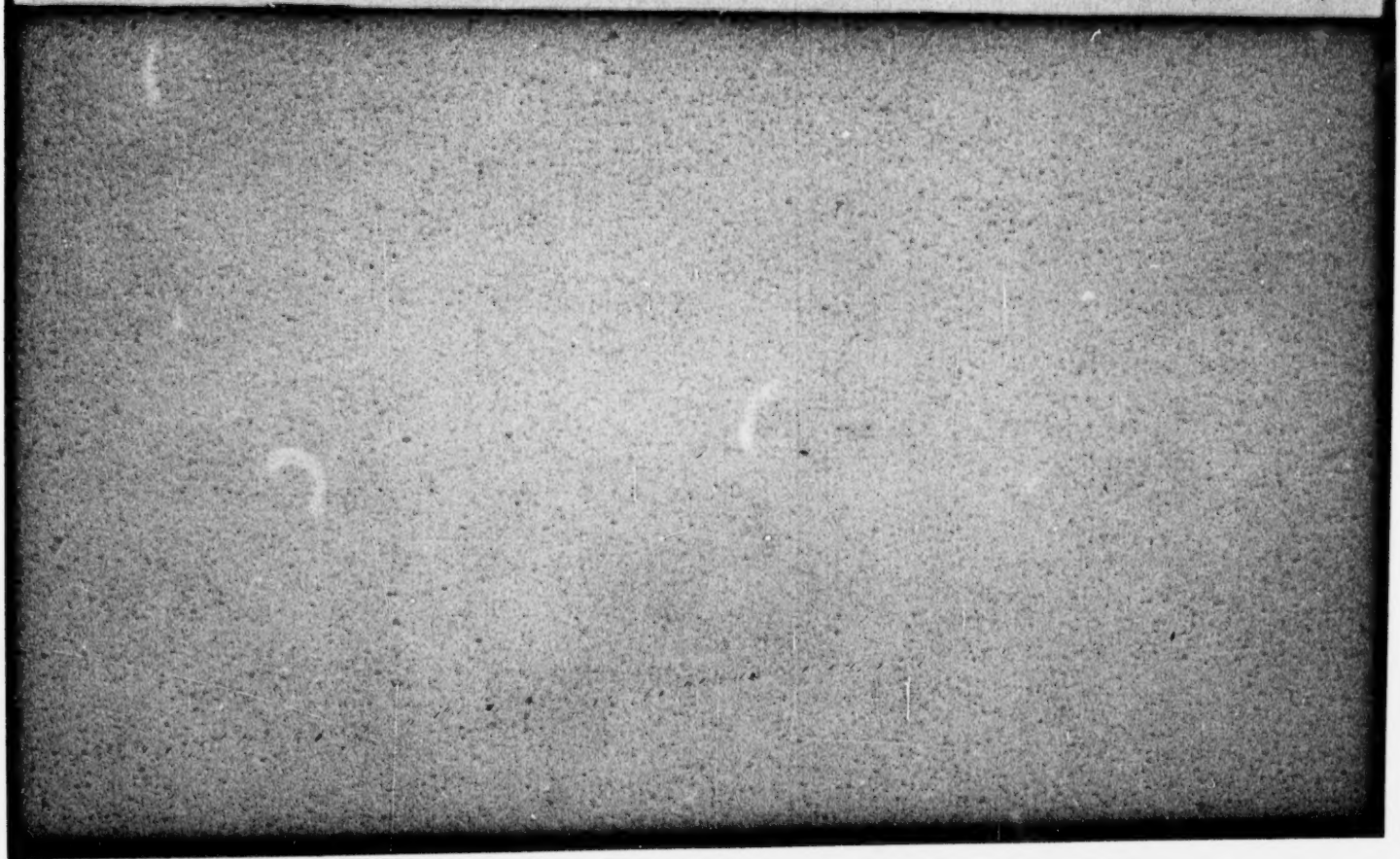
1. For an injunction forever enjoining defendant from discriminating against plaintiff and the class he represents.

2. For back wages plaintiff would have earned had he been reasonably promoted to the rank of foreman.

3. For reasonable attorney's fees and costs.

4. For costs of suit herein incurred and for such other and further relief as to the Court seems just and proper.

NATHANIEL S. COLLEY
Attorney for Plaintiff



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DEC 5
MICHAEL RODA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-570

HERBERT H. DEAN, *Petitioner*,

vs.

FORD MOTOR COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The decision of the Court of Appeals is correct and the case does not present any important or novel question justifying review by this Court.

The District Court found on the basis of substantial evidence that plaintiff had not applied for a job as foreman. Accordingly, neither the District Court nor the Court of Appeals considered it necessary to determine the hypothetical questions which would have arisen if plaintiff had applied for the job and been rejected.

OPINIONS OF THE COURTS BELOW

Neither the decision of the District Court (Appendix A) nor that of the Court of Appeals (Appendix B) has been reported either officially or unofficially.

JURISDICTION

The judgment of the District Court was entered on September 28, 1973. Petitioner filed a notice of appeal on October 25, 1973. The Court of Appeals affirmed the judgment of the District Court on August 13, 1974. This Court has jurisdiction under 28 U.S.C. 1254.

STATEMENT OF THE CASE

Petitioner's statement of the case is not accurate or complete. Accordingly, we submit the following statement:

Petitioner was employed by Ford Motor Company from July, 1966 to January, 1972. In January, 1972, he filed a complaint with the District Court alleging that he had applied for promotion to foreman in Ford Motor Company in November, 1967 and again in June, 1968 and that he was denied promotion because he was a Negro.*

The case was tried before the District Judge. Petitioner testified that in November, 1967 and in mid-1968 he had submitted written applications for promotion to foreman

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*The complaint also alleged the action was brought as a class action. The Court of Appeals held that "the district court was justified on the basis of the record before it, in finding that the requisites for a class action were lacking" (Appx. B, p. 3). Petitioner has not questioned that holding in his petition for certiorari.

to a person whom he identified as his supervisor at each time—a Mr. Rossi and a Mr. O'Brien. Defendant's evidence discredited petitioner's testimony regarding his alleged applications for promotion and showed that his claims were untrue: Mr. Rossi was not, and could not have been, petitioner's supervisor at or near the time when petitioner claimed to have given him an application. Mr. O'Brien testified that he never received such an application. No application by petitioner for promotion to foreman was found during a search of the Company's records. Also, the District Judge, who had the opportunity to observe the demeanor and candor of all the witnesses, noted other reasons why petitioner's testimony lacked credibility (Appx. A, pp. 3-6).

The District Court, after a full trial, found petitioner had made no such application. Judgment was entered for defendant. The Court of Appeals held that the District Court "correctly applied the rule of *McDonnell Douglas*" (Appx. A, p. 2) and affirmed (ibid., p. 3).

ARGUMENT

The decision of the Courts below are in accord with Title VII of the Civil Rights Act of 1964 (78 Stat. 253) and this Court's decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. This Court held in *McDonnell Douglas:*

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a

> racial minority; (ii) that *he applied* and was qualified *for a job for which the employer was seeking applicants;* (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (411 U.S. 802; emphasis added).

After stating that McDonnell Douglas did not dispute any of the foregoing facts, this Court said:

> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the *employee's rejection*" (411 U.S. 802; emphasis added).

The District Court's findings (Appx. A) are precisely in accord with the *McDonnell Douglas* decision.

Petitioner did not establish to the satisfaction of the trier of fact "that he applied * * * for a job for which the employer was seeking applicants" (411 U.S. 802). Therefore there was no need to determine the "reason for the employee's [alleged] rejection." The "burden * * * to articulate some legitimate, nondiscriminatory reason for the * * * rejection" can hardly arise if there were no rejection.

A prima facie case can be rebutted by contradiction or explanation. Petitioner's reference to California cases involving the effect of unrebutted testimony (Petition, pp. 5-6) ignores the fact that the testimony of petitioner was contradicted. The trial court, after a full trial, found that petitioner had not made application for promotion to the position of foreman. The issue of whether he might have

been discriminated against, if he had applied, was therefore not before the court.

Under the *McDonnell Douglas* decision, if one of the elements of a prima facie case is completely wiped out, as contrasted with a case in which the employer asserts legitimate reasons to explain a rejection, there is no occasion to reach the pretext issue.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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